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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

No. 559. **October Term, 1936.**

GENERAL BAKING COMPANY (Plaintiff-Appellant in the Courts Below),

Petitioner,

v.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and CHARLES I. ENGARD (Successor to John J. Sullivan), Special Deputy in Charge (Defendants-Appellees in the Courts Below),

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief on Behalf of Petitioner.

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IN THE

Supreme Court of the United States.

No. 559. October Term, 1936.

GENERAL BAKING COMPANY,

Petitioner,

vs.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, AND CHARLES I. ENGARD (SUCCESSOR TO JOHN J. SULLIVAN), SPECIAL DEPUTY IN CHARGE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

I. OPINIONS OF THE COURTS BELOW.

The first opinion of the District Court of the United States for the Eastern District of Pennsylvania (per Judge Dickinson) was filed on November 12, 1931. It has not been reported and is not printed in the record, but it appears in full *post* on pages 8, 9 of this brief. The second opinion of the District Court (per Judge Kirkpatrick) was filed on October 11, 1932. It is reported in 9 Fed. Supp. 210, and

appears in the record at pages 21 to 27, inclusive. The third opinion of the District Court (per Judge Kirkpatrick) was filed on June 8, 1933. It is reported in 9 Fed. Supp. 210, 214, and appears in the record at pages 73 to 76, inclusive.

The first opinion of the United States Circuit Court of Appeals for the Third Circuit (per Circuit Judge Davis) was filed on September 28, 1934. It has not been reported but it appears in the record at pages 112 to 114, inclusive. The second opinion of the Circuit Court (per Circuit Judge Davis) was filed on September 11, 1936. It is reported in 85 F. (2d) 932, and appears in the record at pages 134 to 138, inclusive. The third opinion of the Circuit Court (per Circuit Judge Davis) was filed on October 16, 1936. It is reported in 85 F. (2d) 932, 934, and appears in the record at page 139.

II. JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A. § 347.

The jurisdiction of the Federal courts is invoked under Section 24 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

The three final decrees of the Circuit Court of Appeals were entered on September 28, 1934, September 11, 1936 and October 16, 1936, respectively. The petition for certiorari was filed on December 8, 1936. Certiorari was granted on January 18, 1937.

III. STATEMENT OF THE CASE.

This case is before this Court on certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the decree of that court entered on September 28, 1934 (R. 114), and the decree entered, after rehearing, on September 11, 1936 (R. 138), as corrected by the decree entered on October 16, 1936 (R. 140). The first of these decrees affirmed the decree of the District Court of the United States for the Eastern District of Pennsylvania entered on June 14, 1933 (R. 77), which dismissed petitioner's bill in equity on the merits. The second decree *reversed* the decree of the District Court on the ground that the District Court should not have exercised jurisdiction over the controversy, and remanded the cause with directions to dismiss the bill. This decree was not in order because the District Court had already dismissed the bill. Therefore, the Circuit Court of Appeals entered its third decree which affirmed the decree of the District Court with directions to refer the cause to the State Court.

Petitioner is General Baking Company, a citizen of New York. Respondents are the Secretary of Banking of the Commonwealth of Pennsylvania and his special deputy, both Pennsylvania citizens. [The individuals who are Secretary of Banking and special deputy at the present time are the successors in office to the individuals who were defendants in the District Court (R. 142).] At the time of institution of the present suit respondents were, under and by virtue of a Pennsylvania statute, in possession and control of the property and assets of Franklin Trust Company, a Pennsylvania banking corporation located in Philadelphia, and the Secretary of Banking had filed a copy of his certificate of taking possession of said bank with the

Prothonotary of the Courts of Common Pleas of Philadelphia County (R. 27 and 47).

This case was heard by the District Court on bill and answer. The bill and answer were twice amended and the bill in its final form, alleges the facts to be as hereinafter set forth.

Petitioner is a New York corporation with its principal place of business in New York City. It is engaged in selling bread, cakes and similar food products throughout the United States (R. 27). In June, 1925, Franklin Trust Company began negotiations with petitioner with regard to the collection of the proceeds of sales made by petitioner's Eastern Pennsylvania, New Jersey and Delaware distributors, which finally resulted, after some correspondence between the parties, in an oral agreement (R. 28 to 31, incl., 39 to 42, incl.). This oral agreement was entered into on August 25, 1925, and its terms and conditions were as follows:

> (a) Petitioner would open a checking account with Franklin Trust Company and maintain therein an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account".
>
> (b) On Wednesday on each week, petitioner would forward from its New York office to Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;
>
> (c) Franklin Trust Company would accept from petitioner's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of

forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to petitioner, or its depository, in New York City; said account to be known as a "Deposit Account".

(d) Franklin Trust Company would select, subject to the approval of petitioner, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of petitioner, cash, drafts and checks to be credited to, and subject to the check of Franklin Trust Company only, but earmarked as the funds of petitioner; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to petitioner in New York City, and a credit advice to be sent immediately to Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to petitioner, or its depository, in New York City.

(e) Petitioner might, at the special request and for the sole benefit of Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with Franklin Trust Company whereby petitioner would allow Franklin Trust Company to use certain sums from those accepted by it for the purposes set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by petitioner's

check only, instead of being forwarded by Franklin Trust Company. Under such agreements, and no other, would said fund, ever, become subject to check. (R. 31, 32.)

On Monday, September 7, 1925, Franklin Trust Company delivered to petitioner in New York City a cashier's check of a New York Bank instead of actual cash, and petitioner objected (R. 33, 43). Franklin Trust Company thereupon acknowledged its error and stated that thereafter the transfer would be effected each Monday morning in cash funds in accordance with the agreement of the parties (R. 33, 43, 44A).

On September 27, 1925, Franklin Trust Company advised petitioner that, inasmuch as collections made by the correspondent banks on Thursday were noted on said banks' books on Friday and advices thereof were received by, and noted on the books of Franklin Trust Company on Saturday, the last out-of-town collections to be included in the cash forwarded each Monday to petitioner in New York City would be those received by the correspondent banks on the preceding Thursday. This met with petitioner's approval (33, 34, 45, 46A).

In August, 1930, the agreement between petitioner and Franklin Trust Company was modified in two particulars: (a) thereafter no interest would be paid on the checking account and (b) Franklin Trust Company would each week make a delivery of cash in New York City to petitioner, or its depository, on Wednesday as well as Monday (R. 35, 36).

Petitioner, up until October 5, 1931, and Franklin Trust Company, up until September 30, 1931, both performed their obligations under the agreement (R. 34, 36).

Correspondent banks in New Jersey, Delaware and Eastern Pennsylvania were selected by Franklin Trust Company and approved by petitioner. (R. 32, 33.) On different occasions during the period from August, 1925, to October 5, 1931, petitioner, in accordance with the terms of the agreement set forth in clause (e), allowed Franklin Trust Company to use sums totalling $1,090,000.00 in its general banking business. (R. 34, 36.)

On Friday, October 2, 1931, there were delivered to Franklin Trust Company for collection, checks and drafts totalling $1,005.52, and on Saturday, October 3, 1931, checks and drafts totalling $8,747.66. The proceeds of these checks and drafts were to be forwarded to petitioner's depository in New York City in accordance with the provisions of the agreement set forth in Clause (c) (R. 37).

On the same dates there was delivered to Franklin Trust Company cash totalling $40,642.67. This cash was likewise to be forwarded to petitioner's depository in New York City in accordance with the provisions of Clause (c) (R. 37).

On September 26 and October 2, 3 and 5, 1931, there were delivered to the correspondent banks cash, checks and drafts in the total amount of $32,403.26. This cash and the checks and drafts were delivered to and accepted by the correspondent banks pursuant to, and for the purposes set forth in Clause (d) of the agreement. Receipt thereof was noted on the books of the correspondent banks on October 5, 1931 (R. 36, 37).

On Monday, October 5, 1931, at the close of the business day, respondents took possession and control of the business and assets of Franklin Trust Company (R. 27, 28). At that time $199.84 in amount of the checks and drafts

which had been delivered to Franklin Trust Company on October 2, 1931, had been collected and were represented by cash (R. 37). Neither this cash nor the cash which had been delivered to Franklin Trust Company on October 2 and 3, 1931, a total of $40,842.51, was ever forwarded to New York City (R. 38).

The checks and drafts delivered to Franklin Trust Company on October 3, 1931, were not collected until on or after October 6, 1931 (R. 37). The proceeds of these checks, together with the $40,842.51 in cash, were diverted to and mingled with the cash funds of Franklin Trust Company without petitioner's consent or approval (R. 38). Franklin Trust Company's cash funds were thereby augmented to the extent of the sum of the amount of these proceeds plus $40,842.51, or $49,590.17 (R. 38). Said cash funds have been, at all times since Franklin Trust Company accepted said cash and said checks and drafts, in excess of $49,590.17 (R. 38).

Credit advices of the receipt of the cash, checks and drafts totalling $32,403.26 by the correspondent banks were not received by Franklin Trust Company until on or after October 6, 1931 (R. 36, 37). When respondents attempted to collect this $32,403.26 from the correspondent banks, petitioner filed a motion for an injunction to restrain them from doing so. After hearing argument on the motion Judge Dickinson of the District Court filed the following opinion:

> "Upon the condition that defendant stipulates that a separate account will be kept of all moneys collected or received, which are subject to the claim of the plaintiff in the Bill, to the end that whatever claim or title or otherwise which the plaintiff has to said

moneys may be asserted to and against the sum in the hands of the defendant, the motion for preliminary injunction is denied."

The $32,403.26 is now held in escrow by a third party under a stipulation entered into in accordance with this opinion. The $49,590.17 has also been placed in escrow. These funds, together with the assets of Franklin Trust Company in respondents' possession and control, are sufficient to pay petitioner and all other preferred claimants in full (R. 38).

The Amended Bill of Complaint as Amended concludes with a prayer (1) that the court declare petitioner to be the owner of the $32,403.26, and (2) that the court declare the $49,590.17 to be impressed with a trust in petitioner's favor (R. 38, 39).

None of the averments of the Amended Bill of Complaint as Amended are denied except the averment that petitioner has no plain, adequate and complete remedy at law. Some of the averments are "qualified" to the extent hereinafter set forth.

In reply to the averments setting forth those terms and conditions of the agreement between petitioner and Franklin Trust Company which are described in paragraphs (c), (d) and (e) above, respondents' answer alleges:

> (c) Petitioner agreed to open a "deposit account" in Franklin Trust Company, wherein all cash, checks and drafts received by petitioner's three Philadelphia plants were to be deposited, the deposits to be credited to petitioner, advices of each deposit to be forwarded to petitioner's offices in New York City, and, on Monday of each week, the balance in the account (as augmented by the funds received under the terms and conditions

hereinafter set forth) to be forwarded by Franklin Trust Company to petitioner, or its depository, in New York City.

(d) Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania and elsewhere, with banks of its selection, said banks to be approved by petitioner, to enable the cashiers of petitioner's distributors in said towns to deposit cash, checks and drafts therein, the cash, checks and drafts to be credited to the account of Franklin Trust Company, subject only to withdrawal by check of Franklin Trust Company, an immediate written acknowledgment of the receipt thereof to be mailed to petitioner, and an immediate credit advice to be forwarded to Franklin Trust Company, all said cash, checks and drafts to be credited to petitioner's "deposit account" in Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to petitioner, or its depository, in New York City.

(e) Respondents have no knowledge that the agreement as set forth in the corresponding paragraph of the bill was entered into for the sole benefit of Franklin Trust Company and, if the same is material, demand proof thereof.

Under the terms and conditions of the agreement between petitioner and Franklin Trust Company, as set forth in the bill and qualified in the answer, Franklin Trust Company was authorized to retain and use all money deposited in Franklin Trust Company or the correspondent banks, including moneys deposited in accordance with the provisions set forth in para-

graphs (c) and (d) for those periods of time during which said moneys were in the possession of Franklin Trust Company and/or the correspondent banks, and there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein (R. 48, 49).

In reply to the averment in the bill that the $49,590.17 was diverted to and mingled with the cash funds of Franklin Trust Company without petitioner's consent or approval, the answer admits that it was mingled without first obtaining petitioner's *specific* consent or approval. The answer then avers that under the terms and conditions of the agreement as set forth in the bill and "qualified" by the answer, consent and approval were given by petitioner to Franklin Trust Company to divert to and mingle with its general cash funds, the cash and proceeds of drafts and checks deposited with it (R. 52, 53).

The District Court held that it had and would exercise jurisdiction of the controversy. No cross appeal from this decision was filed by respondents. On the merits the District Court held that petitioner was not the owner of the $32,403.26 and that there was no ground for impressing the $49,590.17 with a trust in petitioner's favor, and dismissed the bill. After reargument, but prior to the District Court's final decision of the case, petitioner filed requests for findings of fact and conclusions of law (R. 54 to 73 incl.). These were never answered, and the District Court did not make findings and conclusions of its own. The Circuit Court of Appeals, in its opinion filed on September 28, 1934, followed the decision of the District Court and affirmed its action in dismissing the bill.

On November 21, 1934 the Circuit Court of Appeals granted (R. 133) petitioner's petition for a rehearing on the merits (R. 115 to 131 incl.). Reargument on the merit was held on December 15, 1934. Not until September 11, 1936, almost a year and three-quarters later, did the Circuit Court of Appeals enter its decree reversing the decree of the District Court and remanding the cause with directions to dismiss the bill on the ground that the District Court was in error in exercising jurisdiction. On October 16, 1936 the Circuit Court of Appeals entered its decree correcting its decree of September 11, 1936 and affirming the decree of the District Court with directions to refer the cause to the State Court.

IV. SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals for the Third Circuit erred in deciding that the District Court erred in exercising jurisdiction of the instant controversy.

2. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 78 in that court. The assignment reads:

> "78. The Learned Chancellor erred in refusing to affirm the plaintiff's seventh request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> '7. Full title to, and ownership of, the drafts and checks, amounting to $9,753.18, delivered by plaintiff's distributors on October 2 and 3, 1931, for collection by the Franklin Trust Company, for the purpose of forwarding and delivering the proceeds thereof to plaintiff in New York, remained in plaintiff until the same were collected by defendants on or after October 6, 1931.' " (R. 104)

3. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 79 in that Court. The assignment reads:

> "79. The Learned Chancellor erred in refusing to affirm the plaintiff's eighth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> > '8. The Franklin Trust Company was not a purchaser for value of any of the drafts and checks, amounting to $9,753.18, delivered to it for collection by plaintiff's distributors on October 2 and 3, 1931.' " (R. 105)

4. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 80 in that Court. The assignment reads:

> "80. The Learned Chancellor erred in refusing to affirm the plaintiff's ninth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> > '9. The collection by defendants of the proceeds of the drafts and checks, delivered by plaintiff's distributors to the Franklin Trust Company, on October 2 and 3, 1931, in the amount of $8,747.50, and their subsequent failure to forward and deliver the proceeds to plaintiff in New York City, constituted the defendants trustees ex maleficio for that amount.' " (R. 105)

5. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 81 in that Court. The assignment reads:

> "81. The Learned Chancellor erred in refusing to affirm the plaintiff's tenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

'10. Under Section 13 of the Pennsylvania Act of June 12, 1931, P. L. 572, plaintiff has a right to the immediate payment of $8,747.50, the proceeds of drafts and checks accepted by the Franklin Trust Company for collection and collected by defendants subsequent to the closing of the Franklin Trust Company.' " (R. 105)

6. The Circuit Court of Appeals for the Third Circuit erred in refusing to follow the decision of the Supreme Court of Pennsylvania in the case of *Franklin Trust Company (Claim of C. D. Tuska)*, 319 Pa. 302 (1935), interpreting and applying the Pennsylvania Banking Act of June 12, 1931, P. L. 568.

7. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 85 in that Court. The assignment reads:

"85. The Learned Chancellor erred in refusing to affirm the plaintiff's fourteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

'14. The acceptance from plaintiff's agents by the correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania, of cash, also drafts and checks for collection, for the purpose of crediting the same to the Franklin Trust Company in Philadelphia, for forwarding and delivering the cash, together with the proceeds of the checks and drafts, amounting to $32,403.26, to plaintiff in New York City, created an express trust thereof.' " (R. 106)

8. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 84 in that Court. The assignment reads:

"84. The Learned Chancellor erred in refusing to affirm the plaintiff's thirteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

> '13. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were the agents of plaintiff.' " (R. 106)

9. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 72 in that Court. The assignment reads:

"72. The Learned Chancellor erred in refusing to affirm the plaintiff's first request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

> '1. The acceptance by the Franklin Trust Company from plaintiff's distributors in Philadelphia, of the cash, also the drafts and the checks for collection, for the purpose of forwarding and delivering the cash, together with the proceeds of the drafts and checks, amounting to $49,590.17, to the plaintiff in New York City, created an express trust thereof.' " (R. 103)

10. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 74 in that Court. The assignment reads:

"74. The Learned Chancellor erred in refusing to affirm the plaintiff's third request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

> '3. There was an equitable assignment to plaintiff of cash funds in the possession of the Franklin Trust Company in the amount of $40,642.67.' " (R. 103)

11. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 75 in that Court. The assignment reads:

> "75. The Learned Chancellor erred in refusing to affirm the plaintiff's fourth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> > '4. Plaintiff has an equitable lien on the fund of $49,590.17, in defendants' possession, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.'" (R. 103, 104)

12. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 94 in that court. The assignment reads:

> "94. The Learned Chancellor erred in entering as a final decree in this cause, on the fourteenth day of June, A. D. 1933, the following:
>
> > 'This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, Adjudged and Decreed as follows:
> >
> > 'That plaintiff's Bill in Equity be dismissed, with costs to be paid by plaintiff.'" (R. 108)

13. The Circuit Court of Appeals for the Third Circuit erred in entering its decree of September 28, 1934. The decree reads:

> "This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. WARREN DAVIS, Circuit Judge."
(R. 114)

14. The Circuit Court of Appeals for the Third Circuit erred in entering its decree of September 11, 1936. The decree reads:

"This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and same is hereby reversed, with costs, and the cause remanded to the said District Court with directions to dismiss the bill.

Philadelphia, September 11, 1936.

J. WARREN DAVIS, Circuit Judge."
(R. 138)

15. The Circuit Court of Appeals for the Third Circuit erred in entering its decree of October 16, 1936. The decree reads:

"This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree

of the said District Court dismissing the bill of complaint in this cause be, and the same is hereby affirmed, with costs, with directions to the said District Court to refer the cause to the State Court.

Philadelphia, October 16, 1936.

J. WARREN DAVIS, Circuit Judge."
(R. 140)

V. ARGUMENT.

A. The Federal Court Should Exercise Jurisdiction Over This Controversy.

(a) Petitioner is entitled to have this controversy decided by the Federal Court because the parties are citizens of different states.

(Specifications of Error Nos. 1, 14, 15.)

Petitioner is a citizen of the State of New York. Respondents and Franklin Trust Company are citizens of the Commonwealth of Pennsylvania. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00. The District Court, therefore, had jurisdiction under Section 24 of the Judicial Code, Act of March 3, 1911, c. 231; 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

It has long been established that a Federal Court should not, with regard to controversies such as the instant one, abdicate its jurisdiction in favor of a State court. This is true even though a State statute provides that the State court shall be the only forum in which such suits may be instituted.*

Chicot County v. Sherwood, 148 U. S. 529, 37 L. ed. 546, 13 S. Ct. 695 (1893);

McClellan v. Carland, United States District Judge for the District of South Dakota, 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501 (1910).

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*The Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, § 713 (c) contains such a provision. Section 713 (c) of that act reads:

"Any action at law or in equity, based upon a cause of action against the institution of which the secretary [of Banking] is receiver, which may be brought against the secretary as receiver, shall be instituted *only in the court in which the certificate of possession is filed.*" (Italics supplied.)

In *Chicot County v. Sherwood, supra,* it was held that a Statute of the state of Arkansas requiring all claims made against a County in Arkansas on certain bonds issued by it to be presented in the County court, did not avail to preclude the Federal lower court from exercising jurisdiction of a suit against the County brought by a citizen of a foreign state. Mr. Justice Jackson, who delivered the opinion of the court, stated at pages 533; 534:

> ". . . the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other view of the subject would prevent citizens of other States from resorting to the federal courts for the enforcement of their claims against counties of the State, and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this. In Hyde v. Stone, 20 How. 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power . . . They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67; Union Bank v. Jolly's Administrators, 18 How. 503.' This principle has been steadily adhered to by this court."

In *McClellan v. Carland, supra,* (217 U. S. 268), the Circuit Court stayed proceedings before it between citizens of different states pending a determination by the State court of title and interest in certain property involved in

the controversy. The Circuit Court of Appeals refused to issue a mandamus to the Judge of the lower court ordering him to proceed with the case. This Court, on writ of certiorari, held that the Circuit Court had no right to stay the proceedings. Mr. Justice Day, who delivered the opinion of the court, stated, at page 281:

> "The case made upon the bill was within the original jurisdiction of the Circuit Court of the United States. The right of the Circuit Court to maintain such actions, notwithstanding the legislation of the State creating probate courts, has been so recently before this court as to require no further consideration now. *Waterman v. Canal-Louisiana Bank,* 215 U. S. 33. In that case, following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different States to determine interests in estates, and to have the same fixed and declared, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate. The action was therefore within the jurisdiction of the Circuit Court of the United States.
>
> ". . . It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County v. Sherwood,* 148 U. S. 529, 534."

In this connection the language of Mr. Justice Catron in his opinion in *Rundle et al. v. Delaware and Raritan*

Canal Company, 55 U. S. 80, 14 L. ed. 335 (1852) is particularly appropriate. He there said (page 95):

> "If the United States courts could be ousted of jurisdiction, and citizens of other States and subjects of foreign countries be forced into the State courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution; and, in many cases, be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations, in local courts, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist, if he could help it."

Petitioner instituted the present suit on November 12, 1931, shortly after Franklin Trust Company was taken over by respondents. The decree of the Circuit Court of Appeals deciding the controversy on the ground of discretion in exercising jurisdiction was entered, in its final form, on October 16, 1936, almost five years later. Respondents' counsel has personally informed petitioner's counsel that, in the event claim is now or hereafter made in the State court for a preference respecting any or all of the sums in controversy, respondents will contest the same on the ground that the claim is brought too late and petitioner is barred. The correctness of this position is not admitted; nevertheless, these circumstances should be given serious consideration in determining whether or not the Circuit Court of Appeals properly remanded the cause to the District Court with directions to refer it to the State court.

It is submitted that the District Court had jurisdiction of the present controversy and that the Circuit Court of Appeals erred in holding that the District Court abused its discretion in exercising jurisdiction.

(b) It was proper for the District Court to exercise jurisdiction over the present controversy because the suit is in personam.

(Specifications of Error Nos. 1, 14, 15.)

The Circuit Court of Appeals, in holding that the District Court was in error in retaining jurisdiction over the present controversy, cited as the basis for its conclusion, the decisions of this Court in *Gordon v. Washington,* 295 U. S. 30, 79 L. ed., 1282, 55 S. Ct. 584 (1936); *Pennsylvania v. Williams,* 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380 (1935); *Gordon v. Ominsky,* 294 U. S. 186, 79 L. ed. 848, 55 S. Ct. 391 (1935); *Penn General Casualty Company v. Pennsylvania,* 294 U. S. 189, 79 L. ed. 850, 55 S. Ct. 386 (1935).

All of these cases, however, involved the question of the propriety of the action of a Federal District Court in exercising jurisdiction by appointing a receiver to take possession and control of the property and assets of insolvent Pennsylvania financial corporations for the purpose of liquidating and distributing said property and assets to creditors, and thereby divesting the state statutory liquidators from the possession and control of said property and assets.

No such question is involved in the present case. This is a suit *in personam.* It seeks to establish the ownership of certain funds and the right to a preference in others. The cited cases, therefore, do not apply. This distinction has been recognized and expressed by this Court in two recent decisions:

> *Commonwealth Trust Company of Pittsburg et al. v. Avery J. Braddford, Receiver of the Bank of Pittsburgh National Association,*

etc., 297 U. S. 613, 80 L. ed. 590, 56 S. Ct. 600 (1936);

Riehle v. Margolies, 279 U. S. 218, 73 L. ed. 669, 49 S. Ct. 310 (1929).

In *Commonwealth Trust Company of Pittsburgh et al. v. Bradford, supra*, where a Trustee of a fund was appointed by a State Probate Court and was sued in the Federal District Court to establish a claim against said fund by a Receiver of a National bank, Mr. Justice McReynolds, who delivered the opinion of this Court, stated, at pages 619, 620:

> "The jurisdiction of Federal Courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interests therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. . . . Property in its (the trustee's) possession is not in custodia legis as in case of receivers . . ."

> "The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in Pennsylvania v. Williams, 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380, 96 A. L. R. 1166, and Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. ed. 850, 55 S. Ct. 386, supra, is not applicable. In each of those cases we found conflict between the Federal Court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the Federal Court should retain jurisdiction; its power generally to render judgment in personam against fiduciaries appointed by State

Courts was expressly recognized. Here there are no extraordinary circumstances. As contemplated by Congress the Receiver sought an adjudication of his rights. The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment in personam was rendered."

In *Riehle v. Margolies, supra* (279 U. S. 218), it was held that the appointment of a Receiver by a Federal Court on a creditor's bill gave no right to stay a suit against the Receivership debtor then pending in the State court. The language of Mr. Justice Brandeis, who delivered the opinion of this Court in that case, is clear and leaves no doubt as to the petitioner's right in the instant case to have the disputed facts determined in the Federal Courts. It follows (page 224):

"The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88-9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the exist-

ence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*. It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them."

It is submitted that it was proper for the District Court to retain jurisdiction of the present controversy for the purpose of determining the character and amount of petitioner's claim.

(c) No question of comity arises in the present case.

(Specifications of Error Nos. 1, 14, 15.)

Respondents are in possession and control of the property and assets of Franklin Trust Company solely by authority of statute and entirely without action, consent or approval on the part of any State court. See Act of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30, 35, as amended by the Act of May 5, 1927, P. L. 762, §§ 7, 11, 12 (now repealed and supplanted by the Act of May 15, 1933, P. L. 565, §§ 504, 701, 713 (b) and (c). (These sections of these acts are set out in full in the Appendices to this Brief at pages 65 to 76 incl.) Respondent, the Secretary of Banking, was appointed by the Governor of the Commonwealth of Pennsylvania, with the consent and approval of the Senate. See Act of Apr. 9, 1929, P. L. 177, Art. II, § 207, as amended by Act of May 21, 1935, P. L. 217, § 1. Moreover, no order or decree of the State court or any other Court has been entered enjoining or restraining petitioner from prosecuting any suit against respondents.

In *Pennsylvania v. Williams*, supra (294 U. S. 176), Mr. Justice Stone, who delivered the opinion of the court, stated at page 184:

> "Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. See Amos v. Trust Co. of Florida, C. C. A. 5th, 54 F. (2d) 286, 288."

The case of *Amos, Comptroller of State of Florida v. Trust Company of Florida*, 54 F. (2d) 286 (C. C. A. 5th, 1931), cited with approval above, clearly holds that a Liquidator of banks (similar to the Pennsylvania Secretary of Banking) for the State of Florida is subject to suit in the Federal Court, and that even though the Liquidator was confirmed by the State Court he is not a representative of the Court but of the State. Mr. Justice Sibley, who delivered the opinion of the Court, said at page 288:

> "Like the receiver of a national bank, the liquidator, though confirmed by a court, is not an officer of the court, but the representative of the comptroller. . . . He is in court only as he may be specially impleaded. No question of comity between courts arises."

The Court's attention is respectfully directed to the following cases on this point:

Lyon v. McKeefrey et al., 171 Fed. 384 (C. C. A., 3rd, 1909);

Farrell v. Stoddard, Superintendent of Insurance of New York, et al., 1 F. (2d) 802 (D. C., N. D. N. Y., 1924);

In the Matter of Union Bank of Brooklyn, in Liquidation, 176 App. Div. 477, 163 N. Y. S. 485 (1917);

Lyons v. Bank of Discount of City of New York, 154 Fed. 391 (C. C., S. D. N. Y., 1907);

Schofield v. Palmer et al., 134 Fed. 753 (C. C., W. D. Va., 1904);

Allen, Bank Commissioner, et al. v. United States, 285 Fed. 678 (C. C. A., 1st, 1923);

Commonwealth v. Commissioner of Banks in re Prudential Trust Company, 240 Mass. 244 (1922).

In this connection it is most important to keep in mind the fact that the funds in the correspondent banks in New Jersey, Delaware and Eastern Pennsylvania never came into respondents' possession or control but were placed in escrow, where they still remain. Likewise the cash and proceeds of checks and drafts which were delivered directly to Franklin Trust Company have been placed in escrow.

It is submitted that no question of comity arises in the present case and that the Federal Courts should exercise jurisdiction thereover.

B. The Circuit Court of Appeals for the Third Circuit Erred in Failing to Find in Favor of Petitioner upon the Merits.

Petitioner seeks to establish (a) the right to a preference in $8,747.66 in drafts and checks delivered to Franklin Trust Company and *not collected* until *after* Franklin Trust Company closed; (b) the right of ownership of $32,403.26 in cash and checks delivered by petitioner's distributors to the correspondent banks in New Jersey, Delaware and

Eastern Pennsylvania on September 26, October 2, 3 and 5, 1931, and in their possession at the close of the business day on October 5, 1931, when the Franklin Trust Company failed—credit advices thereof not having been received by Franklin Trust Company until *after* it failed; and (c) the right to a preference in $40,842.51 in cash delivered to Franklin Trust Company by petitioner's Philadelphia distributors on October 2 and 3, 1931, for delivery in cash to petitioner's depository in New York City on October 5, 1931.

(a) Petitioner is entitled to the proceeds of the drafts and checks in possession of Franklin Trust Company at the time it was taken over by respondents, and collected thereafter.

(Specifications of Error Nos. 2, 3, 4, 5, 6, 12, 13.)

The Pennsylvania Bank Collection Act of June 13, 1931, P. L. 568, specifically rules this case. The pertinent parts of this Act follow:

> "Except as otherwise provided by agreement . . . the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor . . ." (Section 2.)
>
> "Where a deposited item is payable to bearer or indorsed by the depositor in blank or by special indorsement, the fact that such item is so payable or indorsed shall not change the relation of agent of the bank of deposit to the depositor . . ." (Section 4, third paragraph.)
>
> "Where an agent collecting bank, other than the drawee or payor, shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection,

but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefore, the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank." (Section 13, Clause (c).)

Under the plain language of this Act, which is really a codification of the law as settled by prior decisions of the Pennsylvania appellate courts,* Franklin Trust Company was an agent collecting bank, and petitioner is entitled to an immediate return of the proceeds of the checks and drafts.

**Bank of Wesleyville v. E. D. Rose*, 85 Pa. Superior Ct. 52 (1925); cited with approval in *Jacobs v. Mohnton Trust Co.*, 299 Pa. 527, 530 (1930).

In *Bank of Wesleyville v. Rose, supra,* Judge Gawthrop, who delivered the opinion of the court, stated on page 57:

"It is familiar law that 'when a bank credits a customer with the amount of a check, endorsed by him in blank, deposited in his account, the bank does not in the absence of a special agreement from this fact standing alone become a holder of the paper for value; *the title to the check remains in the depositor . . . The relation arising from such a transaction, as between the bank and the depositor, is that the former becomes the agent of the latter for the purpose of collection*': . . . In Hazlett v. Commercial Bank, 132 Pa. 118, 125, Chief

The Supreme Court of Pennsylvania in *Franklin Trust Company of Philadelphia (Claim of C. D. Tuska)*, 319 Pa. 302 (1935), has expressly so interpreted this Act.

In that case claimant on October 1, 1931, deposited a check on bank *A* with Franklin Trust Company. Franklin Trust Company deposited the check for collection with bank *B*. *B* sent it to bank *C*. It cleared through the New York Clearing House and was paid on October 5. Immediately the amount of the check became an unconditional credit to *B* on *C's* books. Actual payment or unconditional credit was not made by *B* to Franklin Trust Company on October 5, and at the close of that day, the Secretary of Banking took possession. The estimated date of collection was October 6, and Franklin Trust Company on two separate occasions advised claimant it would not honor his draft on it until that time. *B* paid the proceeds to the Secretary of Banking. *Held,* claimant was entitled to a preference. Mr. Justice Maxey, who delivered the opinion of the Court, stated, at page 308:

> "Under sections 2 and 4 of that act, the trust company was clearly the agent of the depositor for its collection . . ."
>
> "No matter what the law of this Commonwealth was prior to the Bank Collection Act of 1931 or what the law may be in other jurisdictions, this act is conclusive of this controversy. The trust company was 'an agent collecting bank' within the meaning of section 13 (c) of that act. The stipulation of the parties

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Justice Paxson said: 'The mere fact that the collecting bank credited him (the depositor) with the check as cash did not alter that relation. This is done daily,—indeed, it is almost the universal usage to credit such collections as cash, unless the customer making such deposit is in weak credit.'" (Italics supplied.)

> is, *in the very words of this act,* that the item 'was neither paid nor remitted to claimant in cash or by an unconditional credit given on the books of the Franklin Trust Company or on the books of any other bank prior to the closing of the bank.' It follows that the assets of the collecting agent bank were impressed with a trust in favor of the appellee for the amount of the proceeds and that therefore the appellee is entitled to a prior claim upon such assets." (Italics by the Court.)

Under the Pennslyvania Bank Collection Act and the cited case decided by the highest Court of Pennsylvania, petitioner is unquestionably entitled to the sum of $8,747.66, proceeds of checks and drafts delivered to Franklin Trust Company for collection and uncollected until after it closed. It is submitted that the Circuit Court of Appeals was in error in holding, contrary to the cited act and decision, that petitioner is not entitled to said $8,747.66.

(b) Upon insolvency, Franklin Trust Company lost its right to receive the funds in the correspondent banks, and petitioner became entitled to immediate possession thereof.

(Specifications of Error Nos. 7, 8, 12, 13.)

Prior to the close of the business day on October 5, 1931, Franklin Trust Company had not received any notice and, consequently, had not made any notation on its books that the $32,403.26 in cash, checks and drafts then in the possession of the correspondent banks had been received by said banks. Such notices were not received until after respondents had taken possession and control of the property and assets of Franklin Trust Company. The cash and the proceeds of the drafts and checks making up the $32,403.26,

are now held in escrow under a stipulation entered into pursuant to the opinion of the District Court of November 12, 1931. Up until the time they were placed in escrow they remained in the hands of the correspondent banks. None of the $32,403.26 ever came into the possession of Franklin Trust Company and, therefore, petitioner is the owner of that fund.

In *Commercial Bank of Pennsylvania v. Armstrong,* 148 U. S. 50, 37 L. ed. 363, 15 S. Ct. 533 (1893), the Commercial Bank of Pennsylvania sent paper for collection and credit to the Fidelity Bank in Cleveland, the balance to be remitted tri-monthly. The Fidelity Bank agreed to "collect at par all points west of Pennsylvania and remit on the first, eleventh and twenty-first of each month" in consideration of the temporary use of the funds. Prior to its failure, the Fidelity Bank had sent some of the paper to sub-agents for collection, and they had collected it and unconditionally credited the Fidelity Bank with the amounts collected before it had become insolvent. This Court held that the funds in the sub-agent banks were the property of, and belonged to, the Commercial Bank of Pennsylvania.

Mr. Justice Brewer, who delivered the opinion of this Court, stated, at pages 56, 57, 58:

> "That money never became a part of the general funds of the Fidelity; it was not applied by the subagent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. . . . If, before the subagent parts with the money or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belong to a third party, in the hands of that insolvent agent or its assignee; and, on the other hand,

> such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected. Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same . . . No mere bookkeeping between the Fidelity and its subagent could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction."

It is submitted that this decision governs the present case in so far as the cash and proceeds of checks and drafts which were in the possession of the correspondent banks at the close of the business day on October 5, 1931, and the Circuit Court of Appeals was in error in not holding that petitioner is the owner of the $32,403.26.

(c) Acceptance by Franklin Trust Company from petitioner's distributors of $40,842.51 in cash, and checks and drafts which were later collected, under an express agreement to deliver cash to petitioner's depository in New York City created an express trust in petitioner's favor.

(Specifications of Error Nos. 9, 10, 11, 12, 13.)

Despite the fact that some of the averments of petitioner's bill are "qualified" by the answer, it is obvious that the facts in this case are not in dispute. The bill and answer clearly establish, with regard to the cash and pro-

ceeds of collected checks and drafts which were delivered directly to Franklin Trust Company, the essential fact that petitioner and Franklin Trust Company agreed this money was to be delivered, *in cash*, to petitioner, or its depository, in New York City by noon of each Monday and Wednesday. Cash was insisted on by petitioner and Franklin Trust Company expressly agreed to deliver cash only. No check, draft or credit advice of Franklin Trust Company, or any other bank, would meet the terms of the agreement. Not even a cashier's check of Franklin Trust Company's New York City correspondent bank (First National Bank of New York) was acceptable to petitioner. And the cash had to be in petitioner's New York City depository each Monday and Wednesday in time for petitioner to draw upon it that afternoon.

Respondents, in the answer to the bill, aver that, "*under the terms and conditions of the agreement*", Franklin Trust Company had the right to *use* all sums of money received by it. This is a statement of respondents' interpretation of Franklin Trust Company's legal rights under the agreement, i. e., a conclusion of law. It is not, and was not intended to be, an averment of fact. But this conclusion of law is incorrect. On the contrary, the facts as established by the pleadings absolutely preclude any inference that the parties understood that Franklin Trust Company was to have the right to use the cash and the proceeds of the checks and drafts delivered to it.

Clause (e) of the agreement of August, 1930, expressly provided under what terms and conditions Franklin Trust Company would be allowed to *use* the cash entrusted to it by petitioner for delivery to its depository in New York City, namely, when special permission was granted to use a specific sum for a definite length of time. Under the doc-

trine "*inclusio unius est exclusio alterius,*" this is strong evidence that neither petitioner nor Franklin Trust Company considered that Franklin Trust Company had the right to *use* this cash fund at any other time.

Other facts impel the same conclusion. In the first place, the agreement originally provided for the payment of 2 per cent. interest on the "Disbursement" or checking account. The account in which it *was* understood Franklin Trust Company was entitled to use the money. By the terms of the agreement, an average of $25,000 had to be maintained in this account. Actually the average balance in this account was always far in excess of this minimum. It is inconceivable that business men of the acumen to require 2 per cent. interest on a checking account would forego interest on money on deposit in another account with the same bank, if they intended the bank to have the same right to use the funds therein. The fact that Franklin Trust Company was not required to pay interest on the "Deposit" account is highly persuasive that it had no right to use the money therein.

In the second place, no provision of the agreement between the parties even suggests that Franklin Trust Company had the right to use these funds except when the parties expressly so agreed. On the contrary, Franklin Trust Company expressly agreed to accept *cash* from petitioner's agents and to forward and deliver *cash* every Monday and Wednesday to petitioner in New York. This negatives any thought of right to use the funds.

In the third place, the parties expressly agreed that when they would enter into separate agreements providing that Franklin Trust Company could use certain sums in its general banking business, for stated periods of time, said sums were to be called by check instead of being forwarded

by Franklin Trust Company to petitioner in New York City, whereas the cash, held by Franklin Trust Company to be forwarded and delivered to petitioner in New York City, was never subject to check. This provision could only have been made because both parties considered the cash held by Franklin Trust Company for the purpose of delivery to petitioner in New York City, as trust property, set apart and not subject to the usual incidents of a general deposit. Of course when the parties, by mutual agreements, divested Franklin Trust Company from its trust obligation as to certain sums, those sums then and there took on all of the incidents of a general deposit, and thereafter were so treated by both parties. However, no agreement, permitting Franklin Trust Company to use petitioner's cash, was in effect on Monday, October 5, 1931.

In the fourth place, petitioner was not required to maintain an average balance in the so-called "Deposit Account." If Franklin Trust Company had contemplated the right to use the funds in this account, would it not have demanded an average balance similar to that required in the "Disbursement Account"?

It is plain that Franklin Trust Company received ample consideration for its contract without having the right to use the funds in the "Deposit Account." Petitioner's object in agreeing to maintain an average balance of $25,000.00 in the checking account was, not to receive the 2 per cent. interest thereon, but to afford consideration to Franklin Trust Company for its undertaking to transfer and deliver the cash accepted by it from petitioner's distributors to petitioner's depository in New York City. Petitioner's action in August, 1930, places this fact beyond doubt.

Interest on money loaned by banks from 1925 to September, 1929, was at the rate of 6 per cent. During those

years, in compliance with the agreement of the parties, petitioner maintained an average balance in excess of $25,000.00 in the "Disbursement Account," upon which Franklin Trust Company paid interest at the rate of 2 per cent. Franklin Trust Company, therefore, derived a considerable profit on this account. This same profit, or at least a materially larger rate than 2 per cent., could have been obtained by petitioner in a secured risk. In addition, petitioner entered special agreements with Franklin Trust Company permitting it to use $450,000.00 for two months in 1927, $440,000.00 for two months in 1928, and $100,000.00 for one month later in 1928. No interest was paid by Franklin Trust Company for the use of these sums. Interest on call money received by Franklin Trust Company on these sums materially increased its remuneration for the work done in connection with the forwarding of the cash accepted from petitioner's distributors to petitioner's New York depository.

It is common knowledge that by August of 1930, interest rates on money had declined. Franklin Trust Company consequently began receiving less profit on the checking account. This prompted a request by it to be permitted to discontinue the payment of the 2 per cent. interest thereon. As stated *supra,* petitioner's main object in maintaining the disbursement account was to afford Franklin Trust Company consideration for *all* its services. Consequently, petitioner agreed to eliminate interest on the checking account. It requested Franklin Trust Company, however, to go to the trouble and additional expense of transferring and delivering the cash twice a week instead of once. This request was granted.

Manifestly Franklin Trust Company received adequate consideration for all its services without the right to use the funds in the "Deposit Account."

Under these circumstances it is clear that a fiduciary relationship existed between plaintiff and Franklin Trust Company with respect to the $40,842.51 under four different principles of law, namely: (1) acceptance of money from one person for delivery to another constitutes the taker a trustee; (2) acceptance by a bank of a deposit for a particular purpose makes the bank a trustee; (3) acceptance by a bank from a customer of a deposit for the purpose of purchasing cash for the customer in another city constitutes the bank a trustee; and (4) equity regards as done that which ought to have been done.

These principles will be discussed in the order stated.

1. Acceptance of Money From One Person for Delivery to Another Constitutes the Taker a Trustee for the Latter.

Franklin Trust Company expressly agreed to accept the cash sum of $40,842.51 for transfer and delivery in cash to petitioner's depository in New York City. It failed to apply the cash to the purpose for which it was accepted. This money has been traced into a specific fund, namely, the cash fund of Franklin Trust Company, which was augmented thereby, and at all times has been, and now is, in excess of the total amount of petitioner's claims. Consequently, when respondents took over this specific fund, it included $40,642.67 of petitioner's cash.

That this constituted Franklin Trust Company a trustee is made manifest by the rule enunciated by this Court in the case of *McKee v. Lamon*, 159 U. S. 317, 322 (1895), in the following words:

"There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor [citing cases]."

And in *City of Miami v. First Nat. Bank of St. Petersburg, Fla., et al.*, 58 F. (2d) 561 (C. C. A. 5th, 1932), where two banks were involved, the Court, speaking per Judge Hutcheson, stated at page 562:

"The St. Petersburg bank, then, in receiving and collecting the item, was the agent of the City of Miami, and, unless the facts show, or the law implies, an agreement that after collection it ceased to be agent of, and became debtor to, the city, it held the $5,000 collected for it, impressed with a trust which it could not discharge except by delivering the money to its principal; for, simply stated, '*every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity, as a trustee, for a breach of trust.*' [Citing cases.]" (Italics supplied.)

It may be argued that, in the absence of an express agreement to the contrary, it is a custom of banks to use in their general banking business all deposited funds regardless of the purpose for which the same was accepted. At the outset it should be borne in mind that no such custom was pleaded. This was fatal, and respondents are precluded from presently raising this question.

Dakin v. Bayly, 290 U. S. 143, 78 L. ed. 229, 54 S. Ct. 113 (1933);

Cameron v. Carnegie Trust Co., 292 Pa. 114 (1928).

In *Dakin v. Bayly*, the Court, speaking per Mr. Justice Roberts, at pages 147, 148, stated:

> "As was said in the Malloy Case, the effect of the statute might be avoided by agreement or by clear and certain custom known to the depositor, *but no such agreement or custom was pleaded by the defendant.*"
>
> " . . . Nor is any custom pleaded whereby the Clearwater bank was to become the debtor of the depositors of the checks upon receipt of something other than cash or equivalent from the subagent . . . ." (Italics supplied.)

In *Cameron v. Carnegie Trust Co., supra*, the Court, speaking per Mr. Justice Simpson, stated, at pages 119 and 120:

> "*The present record is silent regarding any such alleged custom, and no authority has been shown us which so asserts,* where, as here, the collecting agency was insolvent when the check, note or draft was received and collected. If such a custom exists, it is, as respects the present status, a bad one, and the courts will not enforce it (Holmes v. Johnson, 42 Pa. 159; Dempsey v. Dobson, 184 Pa. 588), since it would enable a banking institution to successfully commit a fraud . . . ." (Italics supplied.)

Furthermore, there is no such custom as between a bank and an individual. And even if there were, it would not supplant the rule of law that the acceptance of money from one person for delivery to another constitutes the taker a trustee. This was decided by this Court in *Federal Reserve Bank of Richmond v. Malloy, et al., trading as Malloy Brothers*, 264 U. S. 160, 170, 171 (1924), where it stated:

> "It is said, however, that there is a custom among banks to settle among themselves by means of drafts so well established and notorious, that judicial notice of it may be taken. But the usage here invoked is not that, but is one of special application to a case where the collection of a check is intrusted to the very bank upon which the check is drawn and where payment is accepted in a medium which the contract, read in the light of the law, forbids. The special situation with which we are dealing is controlled by a definite rule of law which it is sought to upset by a custom to the contrary effect. It is not now necessary to consider the effect of a custom which contravenes a settled rule of law or the limits within which such a custom can be upheld. See Barnard v. Kellogg, 10 Wall. 383, 390-394. Decisions upon that question are in great confusion. But whatever may be the doctrine in other respects, certainly a custom relied upon to take the place of a settled principle of law, and therefore to have the force of law, ought to be as definite and specific in negativing the principle as the law which it assumes to supplant is in affirming it."

In *Pottorff v. Key*, 67 F. (2d) 833, (C. C. A. 5th, 1933), the Court, in holding that a trust existed in a fund accepted from a customer by a bank, stated (page 833):

> "It was shown that the banks in El Paso habitually used money thus deposited 'in escrow,' putting in its place as a memorandum a cashier's check or a certificate of deposit; but there is no evidence that Key [claimant] knew of, or assented to, any such thing. The bank's agreement with him was express that it would hold—not borrow or use—the money, and would in the contingency which happened return it to him."

It is unquestioned that Franklin Trust Company accepted the cash sum of $40,842.51 under express agree-

ment with, and notice from, petitioner to deliver it to petitioner's depository in New York City on Monday, October 5, 1931. Franklin Trust Company had no right to use this money. It is submitted, therefore, that, under the above cases, Franklin Trust Company was a trustee of this money that it received from one person for delivery to another.

2. Acceptance by a Bank of Deposits for a Specific, Designated or Particular Purpose Constitutes the Bank a Trustee Thereof Until the Purpose Is Accomplished.

The cash sum of $40,842.51 was accepted for a specific, definitely-designated purpose, namely, the delivery of that amount of cash to petitioner's depository in New York City. That the acceptance of the cash under such terms constituted Franklin Trust Company a trustee is well established.

Libby v. Hopkins, 104 U. S. 303 (1881);

Massey et al. v. Fisher, 62 Fed. 958 (C. C., E. D. Pa. 1894);

Keyes v. Paducah & I. R. Co., 61 F. (2d) 611 (C. C. A., 6th, 1932);

Pottorff v. Key, supra (67 F. (2d) 833);

Smith v. Mottley, 150 Fed. 266 (C. C. A., 6th, 1906);

Parker State Bank v. Pennington, 9 F. (2d) 966 (C. C. A., 8th, 1925);

Merchants' Nat. Bank of Helena, Mont., et al., v. School Dist. No. 8, of Meagher County, Mont., 94 Fed. 705 (C. C. A., 9th, 1899);

Montagu et al. v. Pacific Bank et al., 81 Fed. 602 (C. C., N. D. Cal., 1897);

Salzburger Bank v. Standard Oil Company, 173 Ga. 722 (1931);

Weitzel v. Traders' National Bank, 18 Pa. Superior Ct. 615 (1901);

Bank of the United States v. Macalester, 9 Pa. 475 (1848);

Vosburg's Estate, 279 Pa. 329 (1924);

Commonwealth, ex rel. v. Tradesmen's Trust Company, 61 Pa. Superior Ct. 137 (1915);

Commonwealth v. Tradesmen's Trust Company (No. 1), 250 Pa. 372 (1915);

Commonwealth, ex rel. v. Tradesmen's Trust Company (No. 2), 250 Pa. 378 (1915);

Commonwealth, ex rel. v. Tradesmen's Trust Company (No. 3), 250 Pa. 383 (1915);

Girard Avenue Title and Trust Company Case, 317 Pa. 313 (1935);

Peoples-Ticonic Nat. Bank et al. v. Stewart, 86 F. (2d) 359 (C. C. A., 1st, 1936);

I Patton, Digest of Banking Law, § 1789;

I Perry, Trusts and Trustees (7th ed.) § 122;

7 C. J. p. 631, § 307.

In *Libby v. Hopkins, supra*, (104 U. S. 303), Stewart and Company were bankers and merchants. Hopkins maintained a cash account and a merchandising account with them. His remittances were credited in his cash account. He paid for merchandise by draft. He borrowed $100,000.00 from Stewart and Company, giving his demand note, secured by several mortgages. He made payment of $25,000.00, $10,000.00, $17,000.00, $10,000.00 and $48,025.00, at various times, with instructions that same be applied upon payment of his note. The first three payments were so applied; the last two were not. Thereafter Hopkins failed, owing Stewart and Company $231,515.00, on account and

unsecured. Stewart and Company endeavored to foreclose the mortgages, claiming the full principal of the note, less the first three payments. The Court held that Hopkins was entitled to credit for the last two payments as well. Mr. Justice Woods, in his opinion in that case, stated, at page 308:

> " . . . And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, *with express directions to apply them on a specific debt.* Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has never been given.
>
> "Whether or not he had the right to direct the application, is immaterial. There was no legal obstacle to the application as directed. *The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him.*
>
> *"They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit.*
>
> "Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. . . .
>
> "But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. *When A. sends money to B., with*

directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting. . . .

". . . *The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees.*" (Italics ours.)

In the instant case, as in the cited case, a bank was involved; the customer had two accounts with the bank; the bank accepted money and drafts with express directions to apply them to a designated purpose; the customer never gave consent to the bank to become the customer's debtor; there was no legal obstacle to the application of the cash as agreed upon by the customer and the bank; the directions imposed on the bank "the obligation to apply the money as directed, or to return it to" petitioner; the bank "had no better right to refuse to make the application and to retain the money" and misapply it "than if . . . [the bank] had been directed to pay money on a debt due from . . . [petitioner] to another of . . . [petitioner's] creditors, or than . . . [the bank] had to apply to the payment of . . . [petitioner's] debt to . . . [the bank] money which . . . [petitioner] left with . . . [the bank] as *a special deposit;*" the bank "held . . . [petitioner's] money in trust to apply it as directed by . . . [petitioner];" the bank "refused to make the application as . . . [petitioner] directed; and the bank held it, therefore, subject to . . . [petitioner's] order."

It is submitted that *Libby v. Hopkins* rules the instant case, and conclusively shows that Franklin Trust Company was a trustee as to said cash sum of $40,642.67.

In the case of *Massey et al. v. Fisher, supra* (62 Fed. 958), where an indorser paid a note to a bank, and took a receipt containing an order for a surrender of the note on return of the receipt, the Circuit Court for the Eastern District of Pennsylvania held that the relation between the bank and the indorser was not that of debtor and creditor, but was a fiduciary relation, entitling the indorser, on the bank's becoming insolvent without applying the money on the note, or procuring its surrender, to have the assets in the hands of its receiver applied in payment thereof.

In *Keyes v. Paducah & I. R. Co.*, *supra* (61 F. (2d) 611), the Court, speaking per Judge Simons, stated at page 613:

> "Trusts have been impressed upon funds which are not strictly special deposits, and where there is no intention expressed or clearly to be implied that the funds deposited should be segregated and not commingled with the general funds of the bank. . . . *Another ground for such declaration of trust is the receipt of funds to be applied and used for a definitely designated purpose, but which are in fact fraudulently or unlawfully appropriated to other uses. This misapplication constitutes a wrongful act, and makes the recipient a trustee.*" (Italics supplied.)

In *Pottorff v. Key, supra* (67 F. (2d) 833), the claimant, Key, in connection with the purchase of certain real estate, delivered his check in the amount of $500.00 to the bank "'in escrow,' to be forfeited to the vendor as damages if the title proved good and Key failed to purchase; or to be applied as purchase money if Key kept the contract; or to be returned to Key if the title proved bad." The bank collected the check, accepting the cashier's check of the drawee bank therefor, which was used by the bank in its business. Several weeks later the bank failed and Key became entitled to

the return of his $500.00. Held, that the bank held the $500.00 in trust for the claimant, but preference was disallowed because of inability to trace the fund. The Court, speaking per Sibley, Circuit Judge, stated at page 833:

> "We agree that *the $500 was not a general deposit or a loan to the bank, but was a special deposit, in law a bailment and in equity a trust*. . . . The ownership of the cashier's check which represented the $500 was in Key or his vendor and not in the bank." (Italics supplied.)

In *Smith v. Motiley, supra* (150 Fed. 266), the claimant gave a check to a bank for the purpose of paying a note which the bank claimed to have authority to collect. The bank accepted and collected the check and placed the proceeds to the credit of the payee, but failed to obtain the surrender of the note. The bank subsequently was declared bankrupt. Held, that claimant was entitled to recover the proceeds of the check.

In *Parker State Bank v. Pennington, supra* (9 F. (2d) 966), Mr. Justice Munger, who delivered the opinion of the Court, said, at page 969:

> ". . . payments were to be held by the bank until a deed had been delivered to the plaintiff and an abstract furnished him showing a merchantable title. . . . *The allegations in the complaint, with the allegations that the deed and title contracted for had not been furnished, charged the Parker State Bank with a contractual obligation to return to the plaintiff the money which had been deposited for a special purpose and constituted the bank a trustee of an express trust for the benefit of the plaintiff*. Libby v. Hopkins, 104 U. S. 303, 308 [and other cases].

"'*Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee,* and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust.'" (Italics supplied.)

In *Merchants' Nat. Bank of Helena, Mont., et al, v. School Dist. No. 8, of Meagher County, Mont., supra* (94 Fed. 705), the School District deposited money for the purpose of redeeming matured bonds. The receiver for the bank took possession of a cash sum in excess of the amount deposited. In allowing the claimant a preference, the Court, speaking per Circuit Judge Gilbert, said, at page 707:

"The bank undertook to receive the money as a trust fund for an express purpose, and for no other . . . The money was to be treated as the funds of the School District, and not as the funds of the bank, and, in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds."

In *Montagu et al. v. Pacific Bank et al., supra* (81 Fed. 602), money was deposited in one bank for the account of another, with directions to pay the amount thereof by telegraph to a third bank. The bank, to whose credit the money was deposited, received it, but suspended business before making payment as directed. Held, that this was a deposit for a particular purpose, recoverable in full. Morrow, Circuit Judge, said at page 608:

". . . it is plain that *the deposit in this case should be treated as a special deposit made for a particular purpose,* and not as a general deposit. It was therefore in the nature of a bailment, the complainants never having parted with their title to the money. *Consequently a trust was impressed upon this $5000 in favor of complainants,* and it does not belong to the general creditors of the bank." (Italics supplied.)

In *Salzburger Bank v. Standard Oil Company, supra* (173 Ga. 722), an agent of the Standard Oil Company deposited funds belonging to that company with the Salzburger Bank at Pineoria for the purpose of having them remitted to the district office of the company at Savannah. Before the funds had actually been transmitted the Salzburger Bank closed. The court, in awarding the fund to the Standard Oil Company, stated at page 726:

> *"If an agent places money in the hands of a bank to be delivered to his principal, a trust arises in favor of the latter. The acceptance of the money with notice of its ultimate destination creates a duty on the part of the bank to devote it to the purpose intended,* and a court of equity will enforce the trust. McKee v. Lamon, 159 U. S. 317, 322 (16 Sup. Ct. 11, 40 L. ed. 165); Re Interborough Con. Corp., 288 Fed. 334 (32 A. L. R. 932). *One who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee. . . . In receiving a deposit made for the purpose of having it applied to a particular purpose, the bank acts as agent of the depositor; and when the bank fails to apply it at all, or misapplies it, it can be recovered as a trust deposit."* (*Italics supplied.*)

In *Weitzel v. Traders' National Bank, supra* (18 Pa. Superior Ct. 615), where a son deposited money in his father's bank account for the purpose of having it applied to the payment of his outstanding note, payable at the bank, and the teller accepted the deposit and agreed to its application, but before the note was presented, a year afterwards, when long overdue, the father withdrew the son's money, with the permission of the bank, the court held the bank liable to the son for the amount deposited.

The Court, per Porter, *J.*, stated at page 620:

"We are of opinion that it was the duty of the bank to hold the money and apply it to the payment of the plaintiff's note, *for which purpose alone it was deposited, and that having failed to do so, the bank is liable to the plaintiff for the damages resulting to the plaintiff therefrom.*" (Italics supplied.)

The Supreme Court of Pennsylvania in *Bank of the United States v. Macalester, supra* (9 Pa. 475), held that where funds were deposited in a bank for a special purpose, the Receiver could not refuse to apply them to the object for which they were deposited on the ground that a debt was due the bank by the depositor, stating at page 482:

"It would be a culpable breach of trust to appropriate the fund to any other purpose, and especially to apply it to their own use."

In *Vosburgh's Estate, supra* (279 Pa. 329), renewal notes were sent by the maker to the payee to be discounted and the proceeds used to lift the old notes. Between the day of discount and time for payment, the payee died, the moneys in question having been placed in his own account. In holding for the claimant, the court, through Mr. Justice Kephart, said at page 332:

". . . Every deposit is a trust, except possibly general bank deposits; *every person who receives money to be paid to another or to be applied to a particular purpose is a trustee,* if so applied as well as when not so applied." (Italics supplied.)

In *Commonwealth, ex rel. v. Tradesmen's Trust Company, supra* (61 Pa. Superior Ct. 137), real estate settlement money was delivered to the Trust Company to be delivered to the vendor on settlement. The Trust Company delivered its own check, drawn on itself, to the seller, but before the check was presented, the Trust Company failed.

In *Commonwealth v. Tradesmen's Trust Co.*, (No. 1), *supra* (250 Pa. 372), the Trust Company had a contract with a builder by which it sold certain securities belonging to the builder under an agreement that the funds so received therefrom should be subject to the check of the builder and should be used in a building operation. The Trust Company wrongfully mingled the funds so received with its own funds and failed.

In *Commonwealth, ex rel. v. Tradesmen's Trust Company* (No. 2), *supra* (250 Pa. 378), the plaintiff made an assignment to the Trust Company for the benefit of creditors. The Trust Company turned the assets into cash and mingled the cash with its general funds.

In *Commonwealth, ex rel. v. Tradesmen's Trust Company* (No. 3), *supra* (250 Pa. 383), the Trust Company mingled with its general funds, money delivered to it for the purpose of purchasing certain bonds.

In each of the above cases (Tradesmen's Trust Company) the Court held that *there was a trust created in the fund in question.* Recovery was denied, however, because (unlike the instant case) the money was not traced into a specific fund.

In *Girard Avenue Title and Trust Company Case, supra* (317 Pa. 313), a bank accepted the note of a depositor with the understanding that the proceeds would be credited to his deposit account. The bank mingled the note with its general assets and gave no credit to the depositor for the proceeds. It was held that the action of the bank constituted a conversion of the proceeds of the note, thus giving rise to a trusteeship *ex maleficio* thereof. It was further held that the bank could not set off its claim on the note against the fund held in trust for the depositor and

that, upon the insolvency of the bank, the depositor was entitled to a preference with regard to the traceable proceeds of the note.

In *Peoples-Ticonic Nat. Bank et al. v. Stewart, supra* (86 F. (2d) 359), a bank, as the executor of a mortgagee's estate, refused to accept a certified check tendered in payment of the mortgage debt in the absence of its attorney. Thereupon the check was deposited in the mortgagor's account with the bank with the understanding that it was to be applied in discharge of the mortgage. The bank was closed before it delivered a deed in discharge of the mortgage. It was held that the mortgagor could compel the receiver of the bank to apply the proceeds of the certified check in discharge of the mortgage and the bank as executor to discharge the mortgage because there was a trust in said funds in favor of the mortgagor.

In the case now before the Court petitioner and Franklin Trust Company specifically and definitely agreed, *prior* to the acceptance of the cash sum of $40,842.51 by the bank, that the sole purpose of delivering the cash to Franklin Trust Company was to have it transferred and delivered to petitioner's depository in New York City on Monday, October 5, 1931. The cash in question was handed to Franklin Trust Company under and subject to that agreement. Petitioner fulfilled every item of its contract. Nothing remained to be said or done on its part. The only thing which remained undone was the application of the cash by Franklin Trust Company in accordance with the given and accepted directions. It is submitted that failure so to apply the cash constituted it a trustee thereof.

3. The Acceptance by a Bank From a Customer of a Deposit for the Purpose of Purchasing Cash for the Customer in Another City Constitutes the Bank a Trustee.

Franklin Trust Company, by the terms of its agreement with petitioner, was required to deliver *cash* to petitioner's depository in New York City every Monday and Wednesday of each week. Whether it be said that Franklin Trust Company accepted from petitioner's agents in Philadelphia the cash for delivery to petitioner in New York, or accepted it as a deposit for forwarding to petitioner in New York, or that petitioner bargained for or purchased cash in New York, the inescapable conclusion is the same: i. e., a fiduciary relationship existed between petitioner and Franklin Trust Company. Petitioner did not bargain for the credit of Franklin Trust Company. It bargained for and purchased cash in New York City. It has never received that which it bargained for and purchased.

In the case of *In Re A. Bolognesi & Co.*, 254 Fed. 770 (C. C. A., 2nd, 1918), a banker received deposits from certain individuals for the purpose of purchasing drafts for presentation in Italy. The banker had purchased and delivered some of the drafts to one class of claimants, but payment upon the drafts was refused when they were presented. The banker had not bought the drafts for the other class at the time he failed. The District Court held that both classes of claimants were entitled to an equal share of the distribution. The Circuit Court of Appeals reversed this, holding that the claimants who had not received the drafts were preferred over the others on the theory that the bankrupt had not carried out his trust as to them, because he took their money but failed to purchase and deliver

the drafts to them. The Court, speaking per Hough, Circuit Judge, stated at page 772:

> "In so far as any claimant gave money to the bankrupt for investment in a specified manner, the bankrupt undoubtedly, by accepting the deposit, undertook to act in the interest of the depositor claimant, and thereby assumed toward him a fiduciary relation (Johnson v. Brooks, 93 N. Y. at page 342) . . .
>
> "But *those claimants who came to the bankrupt to buy drafts and the like, and got what they bargained for, cannot claim against the fund, for their bargains were completed;* they got what they asked for, and, in the absence of any circumstances of active fraud or deception, the fact that the commercial paper issued to them remains unpaid does not change their status as general creditors." (Italics supplied.)

In the case of *In Re Jarmulowsky et al.*, 258 Fed. 231 (C. C. A., 2nd, 1919), bankers received from the petitioner $288.00 for the purpose of forwarding an equivalent sum to a person in Europe. The bankers failed prior to the forwarding of the sum. The Court, following *In Re Bolognesi & Co., supra,* held that the petitioner was entitled to recover the money on the theory that a trust was created and was not carried out. The Court stated at page 232:

> "That the Jarmulowskys in receiving this money acted in a fiduciary capacity, and that the person intrusting such money to them may on tracing the same into the possession of the trustee in bankruptcy recover it in solido, is sufficiently shown by our recent decision in Re Bolognesi, 254 Fed. 770, — C. C. A. —."

In the case of *In Re Gubelman et al.*, 9 F. (2d) 486 (C. C. A., 2nd, 1925), the Court again applied the doctrine of

In Re Bolognesi & Co., supra. In that case claimant went to his bankers, stating that he wished the possession of $9,000.00 in United States currency when he arrived in Germany, and asked them to arrange for this. The bankers wrote a letter to a Leipzig house, requesting it to open a credit for $9,000.00 in favor of the claimant. They furnished a copy of this letter to claimant. Prior to the presentation of the letter by the claimant, the bankers failed. The Court refused the claimant a preference upon the ground that he had received what he contracted for, namely, a letter of credit on the Leipzig house, and, therefore, the bankers had carried out their trust agreement; also, that it had not been shown that the fund proceeded against had contained the claimant's money.

The Court, speaking per Judge Hough, stated at pages 486 and 487:

> "We have held, quite plainly as it seems to us, that if A. intrusts to B. moneys for investment in a particular manner, but B. does not carry out his undertaking and becomes bankrupt, A. may recover his money out of any fund belonging to B.'s estate into which A.'s money can be traced. The reason for this ruling is that B., by undertaking, as stated, assumed a fiduciary relation to A., and by neglecting to invest as agreed was guilty of a breach of trust. In Re Bolognesi, 254 F. 77, 166 C. C. A. 216; In Re Jarmulowsky, 258 F. 231, 169 C. C. A. 297; In Re Shapiro (C. C. A.) 298 F. 1021.
>
> . . . . .
>
> "Therefore the question at bar is primarily one of fact; for if Jasper got a draft, check, or its equivalent, and in so getting received exactly what he asked for and something he thought appropriate for his purpose, he cannot be heard to complain that the bankrupt

was his trustee and committed a breach of trust. This question of fact must be answered in the light of *all* the circumstances."

In the case at bar petitioner asked for and was promised cash delivered to its depository in New York City. Petitioner did not receive this. Therefore, petitioner did not receive "exactly what" it "asked for", and Franklin Trust Company failed before it carried out its obligation. It is submitted that the $40,842.51 thereby became impressed with a trust in petitioner's favor.

4. Under the Maxim, Equity Regards as Done That Which Ought to Have Been Done, There Was an Equitable Assignment of the Cash to Petitioner.

Franklin Trust Company agreed to deliver the sum of $40,842.51 in cash to petitioner's depository in New York City on Monday, October 5, 1931. On that day Franklin Trust Company was open for business and had the cash sum in its possession but, in violation of its agreement, it failed to transfer and deliver it to petitioner's depository. Upon the doctrine of equitable assignment, petitioner is, therefore, now entitled to that cash fund.

Early & Daniel Co. v. Pearson, 36 F. (2d) 732 (C. C. A., 5th, 1929);

Fourth Street Bank (of Philadelphia) v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 S. Ct. 439 (1897).

Early & Daniel Company v. Pearson, supra, involved several claims. In No. 5659, the claimant sent a draft to the Macon Bank for collection. The drawee paid said draft with its check on Bank B, which the Macon Bank deposited

with the Clearing House. Before the Macon Bank was given credit therefor, it failed, and the money was paid to its receiver.

In No. 5737, the Macon Bank made an agreement with thirteen banks that it would arrange with the Federal Reserve Bank to credit all checks of said banks drawn on it to the reserve account of the drawer, and charge the reserve account of the Macon Bank upon receipt of such checks by the Federal Reserve Bank—payment not to be considered final on bad checks. The Macon Bank agreed to maintain on deposit with the Federal Reserve Bank sufficient funds, in addition to its lawful reserve, to cover the checks of said banks, and the Federal Reserve Bank agreed to the plan of immediate credit and debit. This agreement was the sole reason for the thirteen banks carrying balances with the Macon Bank. The banks drew checks amounting to $91,000.00 on the Macon Bank, payable to the Federal Reserve Bank. The Macon Bank closed before these were paid, but at the time, had ample credit in Federal Reserve funds to pay said checks.

The Court, speaking per Judge Bryan, stated at pages 734, 735:

> "A question common to the three cases, and one which in our opinion is decisive of each, is whether the evidence discloses a contract under which there was created an equitable assignment of, or lien upon, funds of the Macon bank in favor of the drawers of the drafts or checks. The doctrine of equitable assignment or liens rests upon the maxim that equity regards as done that which ought to be done, and under it effect will be given to the intention of parties to a contract to make some particular property or fund security for a debt or other obligation. But to make that doctrine applicable

it is necessary that the property or fund be identified or rendered capable of identification. It is not essential, however, that such property or fund be in existence at the time the contract was made; it is sufficient that it be in existence during the time within which the assignment may operate.' 3 Pomeroy's Eq. Jur. (4th Ed.) §§ 1235, 1236, 1237.

"In making specific application of the doctrine of equitable assignment to bank funds, the Supreme Court, in Fourth Street Bank v. Yardley, 165 U. S. 634, 17 S. Ct. 439, 440, 41 L. Ed. 855, said:

'. . . That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court [citing cases]. While an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check, it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice.' And it was also held that an equitable assignment applies, not only to cash on deposit, but also to money or drafts in the course of transmission or collection.

"The just cited case has not been modified, as is contended by the receiver, by Equitable Trust Co. v. First National Bank of Trinidad, 275 U. S. 359, 48 S. Ct. 167, 72 L. Ed. 313, which dealt with bank credits as distinguished from bank funds on deposit, nor by any later Supreme Court decision."

Attention is called to the fact that petitioner delivered $40,048.03 in cash to Franklin Trust Company late Saturday afternoon, October 3, 1931. Franklin Trust Company accepted this cash subject to its agreement to deliver it to petitioner's depository in New York on Monday, October 5, 1931, so that the cash would be available to petitioner by noon of the same day. Franklin Trust Company transacted practically no business from the time this cash was accepted by it on Saturday, October 3, 1931, to the hour it opened Monday morning, October 5, 1931, the time when it was to forward the money to New York. It failed to carry out its agreement on Monday morning, presumably because it realized its insolvency. It follows that it must have known its status on Saturday afternoon when it accepted the cash. Petitioner, however, had no knowledge that Franklin Trust Company was insolvent.

Had Franklin Trust Company done what it should have done, petitioner would have received the cash on Monday afternoon. Since Franklin Trust Company failed to do what it agreed to do, equity will treat this as done. This may be accomplished by considering this cash fund equitably assigned to petitioner, thus entitling petitioner to a preference therein.

Franklin Trust Company's disregard of its duty to transfer on Monday morning, October 5, 1931, the cash sum of $40,842.51, which it had received for that purpose, and its failure to apply the cash to the purpose for which it was accepted, should not inure to the benefit of general creditors to the detriment of petitioner. There is no equity in a conclusion upholding such action.

The reasoning last stated is amply sustained by the cases. In *Cameron v. Carnegie Trust Co., supra* (292 Pa. 114), where a check had been sent to a banking institution

for collection and remittance, the Court held that the relation between the sender and the collector was that of principal and agent and that the trust was an express one. The Court said, at page 120:

> "In the present case, admittedly, the money belonging to appellant was wrongfully included in the trust company's general assets, which were at all times sufficiently large to make good the amount due, and the effect of refusing relief would be to give to other distributees a larger sum than they would have received but for the fraud practiced on appellant. In view of this, to rule in appellee's favor would be to make the fraud successful, whereas to refuse so to do could not possibly result in legal harm to anyone. Hence, we again state, what is and always should be fundamental, that no one, however innocent he may be, will be permitted to benefit by the wrongdoing of another, if the result will be to make effective the injury to the person wronged, and it is equitably possible to prevent such a result: Stirk's Est., 232 Pa. 98, 110; O'Connor v. *O'Connor, 291 Pa. 175.*"

It is submitted that Franklin Trust Company had an obligation under its contract with petitioner to deliver the $40,842.51 cash, in cash to petitioner's depository in New York City; that there was, therefore, an equitable assignment of this cash sum to petitioner, and that equity should enforce this obligation and assignment by allowing petitioner a preference.

Conclusion.

It has been shown that petitioner is entitled to have this controversy decided in the Federal Court because the parties are citizens of different states; that it was proper for the District Court to exercise jurisdiction over the controversy because the suit is *in personam* to establish a right and the court is not required to order distribution of any fund in the hands of the State Court; and that no question of comity arises because the respondents are in possession and control of the property and assets of Franklin Trust Company solely by authority of statute and entirely without action, consent or approval on the part of any State Court. The property in question is held in escrow by a third party pending a final decision of the Court as to the ownership thereof. It is submitted, therefore, that the Federal Court should exercise jurisdiction over this controversy and the decree of the Circuit Court of Appeals for the Third Circuit entered on September 11, 1936, as corrected by the decree entered on October 16, 1936, should be reversed.

It has been further shown that under the provisions of the Pennsylvania Bank Collection Act of June 13, 1931 (P. L. 568), as interpreted by the highest court of the Commonwealth of Pennsylvania petitioner is entitled to the proceeds of the drafts and checks in possession of Franklin Trust Company at the time it was taken over by respondents, and collected thereafter; that upon insolvency, Franklin Trust Company lost its right to receive the funds in the correspondent banks and petitioner became entitled thereto; and that petitioner is entitled to a preference in $40,842.51 because funds in that amount became impressed with a trust in petitioner's favor. It is submitted, therefore, that peti-

tioner is entitled to succeed on the merits and the decree of the Circuit Court of Appeals for the Third Circuit entered on September 28, 1934, affirming the decree of the District Court for the Eastern District of Pennsylvania entered on June 14, 1933, should be reversed with directions to enter a decree in petitioner's favor.

Respectfully submitted,

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APPENDIX A.

Act of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30 and 35.

Section 21. Power of Secretary to Take Possession.—The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

I. Has violated any law regulating its or his business, and has persisted in such violation in disregard of an order duly made by the secretary;

II. Is conducting business in an unauthorized or unsafe manner, and has persisted in disregard of an order duly made by the secretary;

III. Is in an unsafe or unsound condition to continue business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion, the protection of depositors and the public requires such peremptory action;

IV. Has an impairment of capital, which has not been restored or made good within the time fixed by order of the secretary;

V. Has suspended payment of obligations;

VI. Has neglected or refused to comply with the terms of any lawfully issued order of the secretary;

VII. Has refused, upon proper demand, to submit the records and affairs of the business to the secretary, a

deputy, or any duly authorized examiner or agent of the department;

VIII. Has refused to be examined, upon oath or affirmation, regarding such affairs;

IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person.

The secretary may, in like manner, take possession of the business and property of any private or unincorporated bank, otherwise exempt from the supervision of the department, whenever such private or unincorporated bank shall have made an assignment for the benefit of creditors or confessed its insolvency.

Section 22. Certificate of Taking Possession.—When the secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

Such superseded receiver, assignee, or trustee shall forthwith file his account in the court having jurisdiction thereof, and pay over and deliver to the secretary all moneys, securities, assets, and property of such corporation or person in his custody, possession, or control. Said court shall allow credit for expenses and for the disbursements

properly incurred or made prior to the taking possession by the secretary, and shall allow proper compensation to said receiver, assignee, or trustee, and his counsel, which, when determined, shall be paid out of the funds of said corporation or person in the hands of the secretary.

Section 29. Status of Secretary as Receiver.—Except as herein otherwise provided, the secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors.

Section 30. Power of Court to Make and Enforce Orders.—The court having jurisdiction shall have power to make and enforce any and all orders necessary and appropriate to enable the secretary to discharge his duties in connection with the business, property, and affairs of any corporation or person taken into possession by the secretary under the provisions of this act.

Section 35. Actions and Suits.—For the purpose of executing any of the powers and performing any of the

duties hereby conferred and imposed upon him, the secretary may, in the name of the corporation or person, prosecute and defend any and all actions and proceedings at law, in equity, or otherwise, pending at the time when the secretary takes possession of the business and property of such corporation or person.

He may, by bill of discovery or other legal or equitable proceeding, obtain information of, and sue for and recover, any assets, debts, or damages, which such corporation or person might sue for and recover, or which any of the creditors might make available for the payment of their claims.

He may, at any time while he is in possession of the property and business of a corporation, institute and maintain against the directors, trustees, managers, or officers, any action or proceeding which is vested in such corporation or in the stockholders or creditors thereof.

He shall be liable to suit, in his representative capacity, by any person seeking to recover specific property, if such property could have been recovered as against the creditors of the corporation or person levying an execution thereon.

APPENDIX B.

Act of May 5, 1927, P. L. 762, §§ 7, 11 and 12.

Section 21 amended.

Section 7. That section twenty-one of said act is hereby amended to read as follows:

Power to take possession.

Section 21. Power of Secretary to Take Possession.—The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

I. Has violated any law regulating its or his business, and has persisted in such violation in disregard of an order duly made by the secretary;

II. Is conducting business in an unauthorized or unsafe manner and has persisted in disregard of an order duly made by the secretary;

III. Is in an unsafe or unsound condition to continue business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion, the protection of depositors and the public requires such peremptory action;

IV. Has an impairment of capital, which has not been restored or made good within the time fixed by order of the secretary;

V. Has suspended payment of obligations;

VI. Has neglected or refused to comply with the terms of any lawfully issued order of the secretary;

VII. Has refused, upon proper demand, to submit the records and affairs of the business to the secretary, a deputy, or any duly authorized examiner or agent of the department;

VIII. Has refused to be examined upon oath or affirmation regarding such affairs;

IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person.

Private bank or estate of private banker.

The secretary may, in like manner, take possession of the business and property of any private or unincorporated bank, *or the estate of any private banker,* otherwise exempt from the supervision of the department, whenever such private or unincorporated bank shall have made an assignment for the benefit of creditors, or [confessed its insolvency] *for any of the causes mentioned hereinbefore in this section.*

Section 29 amended.

Section 11. That section twenty-nine of said act is hereby amended to read as follows:

Secretary as receiver.

Section 29. Status of Secretary as Receiver.—Except as herein otherwise provided, the secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the *rights, powers, and duties of such corporation or person and with all the* property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, *whether or not the prop-*

erty of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the secretary has possession.

Representative of creditors.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

May surrender burdensome assets.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors.

Section 30 amended.

Section 12. That section thirty of said act is hereby amended to read as follows:

Power of court to make and enforce orders.

Section 30. Power of Court to Make and Enforce Orders.—The court having jurisdiction shall have power to make and enforce any and all orders necessary and appropriate to enable the secretary to discharge his duties in connection with the business, property, and affairs of any corporation or person taken into possession by the secretary under the provisions of this act, *upon petition of the secretary, acting personally or through his duly authorized*

deputy, setting forth the facts; and the court shall also have the power, upon petition of the secretary, acting personally or through his duly authorized deputy, to order and direct other corporations or persons in possession of assets or property, belonging to the corporation or person in possession of the secretary, to transfer or convey said property or assets to the secretary, and to execute and deliver any and all necessary instruments in writing to accomplish that purpose.

APPENDIX C.

Act of May 15, 1933, P. L. 565, §§ 504, 701 and 713.

Section 504. Taking of Possession by Department.—A. The department may take possession of the business and property of any institution subject to its supervision whenever it shall appear to it that such institution—

(1) Is violating its articles of incorporation, any order of the court issued upon application of the department, or any law of the Commonwealth regulating its business; or

(2) Is conducting its business in an unsafe manner; or

(3) Is in an unsafe or unsound condition to transact its business; or

(4) In the case of a corporation, has an impairment of its capital below the minimum required by law or by its articles of incorporation; and in the case of a person, has not made good a depreciation in the value of the bonds or securities deposited with the department below the minimum required by law; or

(5) Has suspended payment of its obligations, without authority of law, and in the case of a building and loan association, has not, for a period of one year after due demand or notice by a shareholder, paid any matured share or any withdrawal; or

(6) Has refused to submit its records and affairs to, or its officers or directors have refused to be examined upon oath or affirmation concerning its affairs by, the secretary, or any other duly authorized examiner, in connection with any lawful examination or investigation; or

(7) Requests the department, by its board of directors or its board of trustees in the case of a corporation, and, in the case of a person, by its individual owner or owners, to take possession for the benefit of depositors, other creditors, and shareholders.

B. Before taking possession, the department shall conduct a hearing before the department and the Department of Justice, which may be attended only by, and notice of which shall be given only to, the officers and directors of the corporation, or the officers and individual owner or owners of the person. After such hearing, the department may, if it first procures the consent of the Department of Justice, take possession:

Provided, however, That whenever immediate action shall be necessary in order to protect the interests of the depositors, other creditors, or shareholders of an institution, it may take possession without conducting a hearing and without the approval of the Department of Justice.

C. In addition, whenever the secretary in his official capacity is appointed receiver by any court of equity, as provided by law, the department shall take possession of the business and property, and the secretary shall act as receiver, of the institution in the same way and with the same rights and limitations as when the department takes possession in the customary manner provided by this act.

Section 701. Status of Secretary as Receiver.—Except as otherwise provided in this act, the secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession of all property to which the institution has title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether

such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any power granted to or any duty imposed upon him as receiver of such institution.

The secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another.

Section 713. Actions and Suits by and against Secretary.—A. For the purpose of executing any of the powers and performing any of the duties respectively conferred or imposed upon him, as receiver, by this act, the secretary may, in his name as receiver of such institution, prosecute any action at law or in equity in any court of this Commonwealth or of any other state, whether or not such action is pending on behalf of the institution at the time he takes possession. He may likewise similarly defend any action at law or in equity pending against the institution at the time he takes possession.

The secretary may, in his name as receiver of a corporation, institute and maintain against any officer, director, trustee, manager, or other employe of such corporation, any action at law or in equity which such corporation, or any shareholder or creditor thereof, could have instituted or maintained; and he may likewise, in the case of a person of which he is receiver, maintain any similar action against the individuals owning the business or against any employe thereof, which a depositor or other creditor of the person could have instituted or maintained.

B. All claims against the institution, suit upon which has not been commenced prior to the time the secretary took possession, shall be presented in the regular manner provided by this act for the presentation of claims. Neither a depositor or other creditor of the institution, nor any other claimant, may maintain any action at law or in equity upon such claim, except by regular method provided by this act for exceptions to the accounting of the secretary as receiver. However, an action for the return of specific property which could have been recovered from the institution of which he is receiver may be maintained against the secretary in his name as receiver of the institution.

C. Any action at law or in equity, based upon a cause of action against the institution of which the secretary is receiver, which may be brought against the secretary as receiver, shall be instituted only in the court in which the certificate of possession is filed.